

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

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4 SUSAN N. OLIMPIADA,

Case No. 2:21-cv-00196-CLB

5 Plaintiff,

6 v.

7 KILOLO KIJAKAZI,¹
8 Acting Commissioner of Social Security,

9 Defendant.

**ORDER DENYING MOTION TO
REMAND AND GRANTING CROSS-
MOTION TO AFFIRM**

[ECF Nos. 20, 23]

10 This case involves the judicial review of an administrative action by the
11 Commissioner of Social Security ("Commissioner") denying Susan Olimpiada's
12 ("Olimpiada") application for disability insurance benefits and supplemental security
13 income pursuant to Titles II and XVI of the Social Security Act. Currently pending before
14 the Court is Olimpiada's motion for reversal and/or remand, (ECF No. 20). Olimpiada
15 seeks the reversal of the administrative decision and/or remand for an award of benefits.
16 (*Id.*) The Commissioner opposed the motion and filed a cross-motion to affirm, (ECF Nos.
17 23/24), and Olimpiada replied. (ECF No. 25.) Having reviewed the pleadings, transcripts,
18 and the Administrative Record ("AR"), (ECF No. 18), the Court concludes that the
19 Commissioner's finding that Olimpiada could perform other work that exists in significant
20 numbers in the national economy was supported by substantial evidence. Therefore, the
21 Court denies Olimpiada's motion for remand, (ECF No. 20), and grants the
22 Commissioner's cross-motion to affirm, (ECF No. 23).

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27 ¹ Kilolo Kijakazi is now the Acting Commissioner of Social Security and is
28 automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

1 **I. STANDARDS OF REVIEW**

2 **A. Judicial Standard of Review**

3 This court's review of administrative decisions in social security disability benefits
 4 cases is governed by 42 U.S.C. § 405(g). See *Akopyan v. Barnhart*, 296 F.3d 852, 854
 5 (9th Cir. 2002). Section 405(g) provides that “[a]ny individual, after any final decision of
 6 the Commissioner of Social Security made after a hearing to which he was a party,
 7 irrespective of the amount in controversy, may obtain a review of such decision by a civil
 8 action . . . brought in the district court of the United States for the judicial district in which
 9 the plaintiff resides.” The court may enter, “upon the pleadings and transcript of the record,
 10 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
 11 Security, with or without remanding the cause for a rehearing.” *Id.*

12 The court must affirm an Administrative Law Judge's (“ALJ”) determination if it is
 13 based on proper legal standards and the findings are supported by substantial evidence
 14 in the record. *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); see
 15 also 42 U.S.C. § 405(g) (“findings of the Commissioner of Social Security as to any fact,
 16 if supported by substantial evidence, shall be conclusive”). “Substantial evidence is more
 17 than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d 1211,
 18 1214 n.1 (9th Cir. 2005) (internal quotation marks and citation omitted). “It means such
 19 relevant evidence as a reasonable mind might accept as adequate to support a
 20 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated*
 21 *Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); see also *Webb v. Barnhart*, 433 F.3d
 22 683, 686 (9th Cir. 2005).

23 To determine whether substantial evidence exists, the court must look at the
 24 administrative record as a whole, weighing both the evidence that supports and
 25 undermines the ALJ's decision. *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995)
 26 (citation omitted). Under the substantial evidence test, a court must uphold the
 27 Commissioner's findings if they are supported by inferences reasonably drawn from the
 28 record. *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).

1 “However, if evidence is susceptible of more than one rational interpretation, the decision
2 of the ALJ must be upheld.” *Orteza*, 50 F.3d at 749 (citation omitted). The ALJ alone is
3 responsible for determining credibility and for resolving ambiguities. *Meanel v. Apfel*, 172
4 F.3d 1111, 1113 (9th Cir. 1999).

5 It is incumbent on the ALJ to make specific findings so that the court does not
6 speculate as to the basis of the findings when determining if substantial evidence supports
7 the Commissioner’s decision. The ALJ’s findings should be as comprehensive and
8 analytical as feasible and, where appropriate, should include a statement of subordinate
9 factual foundations on which the ultimate factual conclusions are based, so that a
10 reviewing court may know the basis for the decision. See *Gonzalez v. Sullivan*, 914 F.2d
11 1197, 1200 (9th Cir. 1990).

12 **B. Standards Applicable to Disability Evaluation Process**

13 The individual seeking disability benefits bears the initial burden of proving
14 disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the
15 individual must demonstrate the “inability to engage in any substantial gainful activity by
16 reason of any medically determinable physical or mental impairment which can be
17 expected . . . to last for a continuous period of not less than 12 months.” 42 U.S.C. §
18 423(d)(1)(A). More specifically, the individual must provide “specific medical evidence” in
19 support of their claim for disability. See 20 C.F.R. § 404.1514. If the individual establishes
20 an inability to perform their prior work, then the burden shifts to the Commissioner to show
21 that the individual can perform other substantial gainful work that exists in the national
22 economy. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998).

23 The first step requires the ALJ to determine whether the individual is currently
24 engaging in substantial gainful activity (“SGA”). 20 C.F.R. §§ 404.1520(b), 416.920(b).
25 SGA is defined as work activity that is both substantial and gainful; it involves doing
26 significant physical or mental activities, usually for pay or profit. 20 C.F.R. §§ 404.1572(a)-
27 (b), 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not
28 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to

1 the second step.

2 The second step addresses whether the individual has a medically determinable
3 impairment that is severe or a combination of impairments that significantly limits the
4 individual from performing basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An
5 impairment or combination of impairments is not severe when medical and other evidence
6 establish only a slight abnormality or a combination of slight abnormalities that would have
7 no more than a minimal effect on the individual's ability to work. 20 C.F.R. §§ 404.1521,
8 416.921; Social Security Rulings ("SSRs") 85-28 and 96-3p. If the individual does not have
9 a severe medically determinable impairment or combination of impairments, then a finding
10 of not disabled is made. If the individual has a severe medically determinable impairment
11 or combination of impairments, then the analysis proceeds to the third step.

12 The third step requires the ALJ to determine whether the individual's impairment or
13 combination of impairments meets or medically equals the criteria of an impairment listed
14 in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525,
15 404.1526, 416.920(d), 416.925, 416.926. If the individual's impairment or combination of
16 impairments meets or equals the criteria of a listing and meets the duration requirement
17 (20 C.F.R. §§ 404.1509, 416.909), then a finding of disabled is made. 20 C.F.R. §§
18 404.1520(h), 416.920(h). If the individual's impairment or combination of impairments
19 does not meet or equal the criteria of a listing or meet the duration requirement, then the
20 analysis proceeds to the next step.

21 Prior to considering step four, the ALJ must first determine the individual's residual
22 functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). The RFC is a function-
23 by-function assessment of the individual's ability to do physical and mental work-related
24 activities on a sustained basis despite limitations from impairments. SSR 96-8p. In making
25 this finding, the ALJ must consider all of the symptoms, including pain, and the extent to
26 which the symptoms can reasonably be accepted as consistent with the objective medical
27 evidence and other evidence. 20 C.F.R. §§ 404.1529 and 416.929; SSRs 96-4p, 96-7p.
28 To the extent that objective medical evidence does not substantiate statements about the

1 intensity, persistence, or functionally-limiting effects of pain or other symptoms, the ALJ
 2 must make a finding on the credibility of the individual's statements based on a
 3 consideration of the entire case record. The ALJ must also consider opinion evidence in
 4 accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs 96-
 5 2p, 96-5p, 96-6p, and 06-3p.

6 After making the RFC determination, the ALJ must then turn to step four to
 7 determine whether the individual has the RFC to perform their past relevant work. 20
 8 C.F.R. §§ 404.1520(f), 416.920(f). Past relevant work means work performed either as the
 9 individual actually performed it or as it is generally performed in the national economy
 10 within the last 15 years or 15 years prior to the date that disability must be established. In
 11 addition, the work must have lasted long enough for the individual to learn the job and
 12 performed at SGA. 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), 416.965. If the
 13 individual has the RFC to perform their past work, then a finding of not disabled is made.
 14 If the individual is unable to perform any past relevant work or does not have any past
 15 relevant work, then the analysis proceeds to the fifth and final step.

16 The fifth and final step requires the ALJ to determine whether the individual is able
 17 to do any other work considering their RFC, age, education, and work experience. 20
 18 C.F.R. §§ 404.1520(g), 416.920(g). If the individual is able to do other work, then a finding
 19 of not disabled is made. Although the individual generally continues to bear the burden of
 20 proving disability at this step, a limited evidentiary burden shifts to the Commissioner. The
 21 Commissioner is responsible for providing evidence that demonstrates that other work
 22 exists in significant numbers in the national economy that the individual can do. *Lockwood*
 23 v. Comm'r, Soc. Sec. Admin., 616 F.3d 1068, 1071 (9th Cir. 2010).

24 **II. CASE BACKGROUND**

25 **A. Procedural History**

26 Olimpiada applied for disability insurance benefits ("DIB") and supplemental
 27 security income ("SSI") on July 6, 2017, and July 16, 2017, respectively, with an alleged
 28 disability onset date of January 1, 2009. (AR 258-69.) Olimpiada's application was denied

1 initially on January 29, 2018, and upon reconsideration on August 28, 2018. (AR 174-83,
2 260-69.) On April 23, 2020, Olimpiada appeared at a telephonic hearing before an ALJ.
3 (AR 62-100.) Although informed of her right to representation, Olimpiada chose to appear
4 and testify without the assistance of an attorney or other representative. (*Id.*) A vocational
5 expert ("VE") also appeared at the hearing via telephone. (*Id.*) The ALJ issued a written
6 decision on August 7, 2020, finding that Olimpiada was not disabled because she could
7 perform other work that exists in significant numbers in the national economy. (AR 37-50.)
8 Olimpiada appealed, and the Appeals Council denied review on December 18, 2020. (AR
9 1-7.) Accordingly, the ALJ's decision became the final decision of the Commissioner.
10 Having exhausted all administrative remedies, Olimpiada filed a complaint for judicial
11 review on February 4, 2021. (ECF Nos. 1-1, 5.)

12 **B. ALJ's Decision**

13 In the written decision, the ALJ followed the five-step sequential evaluation process
14 set forth in 20 C.F.R. §§ 404.1520 and 416.920. (AR 37-50.) Ultimately, the ALJ disagreed
15 that Olimpiada has been disabled from January 1, 2009, the alleged onset date, through
16 the date of the decision. (AR 50.) The ALJ held, based on the testimony of the VE, as well
17 as Olimpiada's age, education, work experience, and RFC, that Olimpiada could perform
18 other work that exists in significant numbers in the national economy. (AR 49-50.)

19 In making this determination, the ALJ first determined that Olimpiada meets the
20 insured status requirements of the Social Security Act through December 31, 2012. (AR
21 40.) The ALJ then went to step one of the five-step sequential evaluation, where the ALJ
22 found Olimpiada had not engaged in substantial gainful activity since the alleged onset
23 date of January 1, 2009. (*Id.*) At step two, the ALJ found Olimpiada had the following
24 severe impairments: a mental impairment diagnosed to include major depressive disorder
25 and generalized anxiety disorder. (AR 40-42.) At step three, the ALJ found Olimpiada did
26 not have an impairment or combination of impairments that either met or medically
27 equaled the severity of those impairments listed in 20 C.F.R. Part 404, Subpart P, Appx.
28 1; 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926. (AR

1 42-44.)

2 Next, the ALJ determined Olimpiada has the RFC to perform a full range of work at
 3 all exertional levels but with the following nonexertional limitations: could perform
 4 noncomplex, routine tasks; could occasionally have contact with the public of a superficial
 5 nature; could not have teamwork-related tasks; could make simple work-related decisions;
 6 and would be able to exercise appropriate judgment in the workplace. (AR 44-48.)

7 The ALJ found Olimpiada's medically determinable impairments could reasonably
 8 be expected to cause some of the symptoms alleged; however, Olimpiada's statements
 9 concerning the intensity, persistence, and limiting effects of those symptoms were not
 10 entirely consistent with the medical evidence and other evidence in the record. (AR 45.)
 11 In reaching this conclusion, the ALJ reviewed and discussed the objective medical
 12 evidence, Olimpiada's treatment history since the alleged disability onset date, and
 13 Olimpiada's subjective testimony. (AR 44-48.) The ALJ found that Olimpiada's RFC was
 14 "supported by the overall evidence of record, the findings of the State agency consultants,
 15 the findings of the consultative examiner, and [Olimpiada's] ability to perform various
 16 activities, including moving between states, driving if she has a person in the car, use Lyft
 17 for transportation, and a report that 'sometimes she watches her grand kids.'" (AR 48.)
 18 The ALJ then determined that Olimpiada is not capable of performing any past relevant
 19 work as a program management analyst. (*Id.*)

20 Relying on the testimony of the VE, the ALJ determined that Olimpiada's age,
 21 education, work experience, and RFC would allow her to perform other occupations
 22 existing in significant numbers in the national economy, such as: cleaner II, hospital
 23 cleaner, and hand packer. (AR 49-50.) Accordingly, the ALJ held that Olimpiada had not
 24 been under a disability since the alleged onset date of January 1, 2009, through the date
 25 of the decision, and denied Olimpiada's claim. (AR 50.)

26 **III. ISSUE**

27 Olimpiada seeks judicial review of the Commissioner's final decision denying DIB
 28 and SSI under Titles II and XVI of the Social Security Act. (ECF No. 20.) Olimpiada raises

1 two issues for this Court's review:

2 1. Whether Olimpiada is entitled to a rehearing because the administrative
 3 proceedings were "tainted by the unconstitutional appointment and tenure of
 4 Andrew Saul as the Commissioner of Social Security"; and,
 5
 6 2. Whether the ALJ sustained her burden at step five of the sequential
 7 evaluation.

8 (*Id.* at 6-14.)

9 **IV. DISCUSSION**

10 **A. Separation of Powers**

11 Olimpiada first argues that the decision denying her disability benefits claim was
 12 constitutionally defective because the Social Security Act provision that limits the
 13 President's authority to remove the Presidentially-appointed, Senate-confirmed
 14 Commissioner of Social Security without good cause—42 U.S.C. § 902(a)(3)—violates
 15 the separation of powers. (ECF No. 20.) The parties agree that 42 U.S.C. § 902(a)(3)
 16 violates the separation of powers to the extent it is construed as limiting the President's
 17 authority to remove the Commissioner without cause. (ECF No. 23 (citing Office of Legal
 18 Counsel, U.S. Dep't of Justice, Constitutionality of the Commissioner of Social Security's
 19 Tenure Protection, 2021 WL 2981542 (July 8, 2021) ("OLC Op.").) However, the
 20 Commissioner makes two primary arguments that Olimpiada's separation of powers
 21 argument does not entitle her to relief. First, the Commissioner argues that because the
 22 ALJ's appointment was ratified by then-Acting Commissioner of Social Security Berryhill,
 23 who was not subject to an impermissible removal restriction, any harm stemming from the
 24 U.S.C. § 902(a)(3)'s removal provision is tenuous at best. (ECF No. 23.) Second,
 25 regardless of the ratification, Olimpiada cannot show she suffered harm as a result of the
 26 unconstitutional removal provision. (*Id.*)

27 Olimpiada fails to make a showing of actual harm as anticipated by Supreme Court
 28 and Ninth Circuit case law. See, e.g., *Collins v. Yellen*, 141 S.Ct. 1761, 1787-89 (2021);
 29 *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1138 ("there is no link between the ALJ's
 30 decision awarding benefits and the allegedly unconstitutional removal provisions. And

1 nothing commands us to vacate the decisions below on that ground.”). Then-Acting
 2 Commissioner Berryhill ratified the ALJ appointment in July 2018, before the ALJ
 3 adjudicated Plaintiff’s claim in 2020. (ECF No. 23 at 8.) Olimpiada is therefore unable to
 4 establish a causal connection between the unconstitutionality of Commissioner Saul’s
 5 tenure under 42 U.S.C. § 902(a)(3) and the adjudication of her claim by a properly
 6 appointed administrative law judge. *Decker Coal*, 8 F.4th at 1137 (refusing to vacate the
 7 adjudication of an ALJ whose appointment was ratified before the decision at issue “absent
 8 a showing of harm.”); *see also Alice A. v. Comm’r of Soc. Sec.*, Case No. C20-5756 RAJ,
 9 2021 WL 5514434, at *7 (W.D. Wash. Nov. 24, 2021) (“Plaintiff has failed to show any
 10 connection between the unconstitutional removal clause and the ALJ’s decision denying
 11 her benefits.”).

12 Olimpiada presents no evidence that her rights were violated by any specific action
 13 taken by the Commissioner or the ALJ at any point in the process. Olimpiada argues that
 14 the Commissioner is exaggerating the harm threshold required for retrospective relief. But
 15 this argument is meritless because Olimpiada cannot show anything more than the remote
 16 and abstract possibility of harm. As was the case in *Decker Coal*, there is no evidence that
 17 “the existence of [the removal restriction] alone tainted the ALJ’s decision.” *Decker Coal*,
 18 8 F.4th at 1137.

19 For the reasons stated above, the Court declines to reverse or remand the prior
 20 rulings in this case and award Olimpiada retroactive relief. Having determined that
 21 Olimpiada’s separation of powers argument does not entitle her to reversal or remand, the
 22 Court proceeds to consider Olimpiada’s substantive challenge to the ALJ’s denial of
 23 disability benefits.

24 **B. VE Testimony**

25 Next, Olimpiada challenges the ALJ’s finding that she could perform a significant
 26 number of jobs—such as a cleaner II, hospital cleaner, and hand packer—and the VE’s
 27 testimony because such testimony allegedly conflicts with “reliable job data” from the
 28 O*NET, that Olimpiada submitted to the Appeals Council. (ECF No. 20 at 13-14.)

1 First, the Court finds that the ALJ was not required to resolve any supposed conflict
 2 between the VE's testimony and O*NET, as it is a non-DOT source. See *Lusson v. Saul*,
 3 Case No. 2:20-cv-01215-DJA, 2021 WL 510618, at *7 (D. Nev. Feb. 11, 2021) ("Plaintiff
 4 failed to cite any binding Ninth Circuit decision that finds that a VE must rely on O*NET or
 5 that O*NET controls when it conflicts with the VE's testimony"); *see also, Grether A. D. v.*
 6 *Saul*, No. CV 20-3356-E, 2021 WL 1664174 at *8 n.8 (C.D. Cal. Apr. 28, 2021) (holding
 7 that "the non-DOT sources [claimant] cites are not conclusive regarding the standing
 8 requirements for the jobs the vocational expert identified") (citing *Tommy D. J. v. Saul*, No.
 9 EDCV 20-1013-RAO, 2021 WL 780479, at *3 n.3, *5 (C.D. Cal. Mar. 1, 2021) (citations
 10 and quotations omitted) (holding "the ALJ is not required to reconcile conflicts between
 11 the VE's testimony and non-DOT sources, such as O*Net OnLine")). As is the case here,
 12 "[t]he Commissioner was also under no obligation to sua sponte resolve a conflict between
 13 job numbers provided by [claimant] and the VE's testimony because the job numbers
 14 came from sources other than the Dictionary of Occupational Titles." *Shapiro v. Saul*, 833
 15 Fed.Appx. 695, 696 (Mem) (9th Cir. 2021).

16 Additionally, the testifying VE had significant experience in the vocational
 17 rehabilitation field. (AR 90-91, 363-64.) The VE explained that her testimony was
 18 consistent with the DOT and its companion publications, except that certain portions of
 19 her testimony, which were based on her "experience and training as a vocational
 20 rehabilitation counselor." (AR 97.) The ALJ was entitled to rely on the VE's testimony and
 21 properly did so in finding that Olimpiada could perform other work. *Bayliss v. Barnhart*,
 22 427 F.3d 1211, 1217-18 (9th Cir. 2005) ("A VE's recognized expertise provides the
 23 necessary foundation for his or her testimony. Thus, no additional foundation is required.");
 24 *see also, Ford v. Saul*, 950 F.3d 1141, 1159 (9th Cir. 2020) (holding that an ALJ's reliance
 25 on qualified, cogent, and uncontradicted expert testimony generally constitutes substantial
 26 evidence in support of the ALJ's finding). Olimpiada's own assessment of vocational data
 27 derived from O*NET and the Occupational Outlook Handbook does not undermine the
 28 reliability of the VE's opinion, which the ALJ adopted at step five. See *Ford*, 950 F.3d at

1 1160 (“a [VE’s] testimony is one type of job information that is regarded as inherently
 2 reliable; thus, there is no need for an ALJ to assess its reliability.”).

3 Further, the ALJ’s reliance on the DOT information, even in the face of conflicting
 4 evidence from other non-DOT sources, is sufficient to demonstrate that substantial
 5 evidence supports the ALJ’s findings. The ALJ is entitled to rely on the VE’s testimony
 6 regarding the number of jobs in the economy. 20 C.F.R. § 416.966(e) (authorizing ALJs
 7 to rely on a VE’s testimony to determine occupational issues). Here, the VE’s testimony,
 8 in reliance on DOT data, meets the substantial evidence standard. See *Terry v. Saul*, 998
 9 F.3d 1010 (9th Cir. 2021) (finding that VE’s testimony regarding jobs plaintiff could perform
 10 “was supported by [the expert’s] unchallenged expertise and her reference to the [DOT]”
 11 and therefore “constituted substantial evidence” despite Plaintiff’s new, conflicting
 12 evidence from O*NET and the Occupational Requirements Survey).

13 Accordingly, for the reasons discussed above, the Court finds and concludes that
 14 the ALJ’s step five finding is supported by substantial evidence and free from reversible
 15 legal error.

16 **V. CONCLUSION**

17 Having reviewed the Administrative Record as a whole and weighing the evidence
 18 that supports and detracts from the Commissioner’s conclusion, the Court finds that the
 19 ALJ’s decision was supported by substantial evidence.

20 Accordingly, **IT IS THEREFORE ORDERED** that Olimpiada’s motion to remand
 21 (ECF No. 20) is **DENIED**, and the Commissioner’s cross-motion to affirm (ECF No. 23) is
 22 **GRANTED**;

23 **IT IS FURTHER ORDERED** that the Clerk **ENTER JUDGMENT** and **CLOSE THIS**
 24 **CASE**.

25 **DATED:** January 3, 2022.

26 
 27

UNITED STATES MAGISTRATE JUDGE
 28